

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
Joint Application of NorthPoint)
Communications, Inc. and Verizon)
Communications for Authority Pursuant to)
Section 214 of the Communications Act of)
1934, as Amended, To Transfer Control of)
Blanket Authorization To Provide Domestic)
Interstate Telecommunications Services as a)
Non-Dominant Carrier)
)

CC Docket No. 00-157

DA 00-2024 —————

COMMENTS OF THE
COMMERCIAL INTERNET EXCHANGE ASSOCIATION

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October 2, 2000

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Authorization To Provide Domestic Interstate)	
Telecommunications Services as a)	
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**COMMENTS OF THE
COMMERCIAL INTERNET EXCHANGE ASSOCIATION**

INTRODUCTION

The Commercial Internet eXchange Association (CIX) is a trade association that represents 125 Internet Service Provider (ISP) networks, which handle approximately 75 percent of the United States' Internet traffic as well as much of the world's backbone Internet traffic.¹ CIX is the world's oldest trade association of ISPs and Internet-related businesses, having been established in 1991 to provide the first commercial access point to the Internet backbone. CIX, by its attorneys, files these comments in response to the Commission's *Public Notice*, issued on

¹ The views expressed herein are those of CIX as a trade association, and are not necessarily the views of each individual member.

September 1, 2000, requesting comment on the proposed transfer of control of NorthPoint's section 214 authorization to provide domestic interstate telecommunications services as a non-dominant carrier in connection with the proposed merger of NorthPoint Communications, Inc. ("NorthPoint") and digital subscriber line ("DSL") businesses owned by Verizon Communications ("Verizon") (collectively "the Parties") into a new non-dominant carrier ("New NorthPoint").² According to a recent NorthPoint press release, the new entity will have approximately 3,000 employees; possess more than 3,000 central office installations with access to 63 million homes and businesses in 163 metropolitan statistical areas ("MSAs"); initially provide more than 600,000 DSL lines; and have strategic marketing relationships with Verizon Online, Microsoft, Blockbuster, Genuity, UUNET, RadioShack, and others.³

While CIX does not oppose the proposed merger, and certainly welcomes increased competition in the broadband markets, CIX is deeply concerned that, without the clarifications and conditions discussed below, the proposed merger could lead to anti-competitive outcomes and potentially put independent ISPs at serious risk.

DISCUSSION

In this section, CIX discusses the specific markets that will be most affected by the proposed merger. CIX also discusses the importance of the *Bell Atlantic/GTE Merger Conditions*⁴ on this proceeding, especially with respect to residential out-of-region market entry

² *Comment Seeks Comment on Joint Application for Consent to Transfer Control Filed by NorthPoint Communications, Inc. and Verizon Communications*, CC Docket No. 00-157, Public Notice, DA 00-2024 (rel. Sep. 1, 2000) ("Public Notice").

³ Press Release, NorthPoint CEO Sees DSL Adoption Accelerating; Competition with Cable Intensifying, PRNewswire, Sep. 20, 2000, at 1, <http://biz.yahoo.com/prnews/000920/ma_northpo.html> ("NorthPoint Press Release").

⁴ *Application of GTE Corporation and Bell Atlantic Corporation, For Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable*

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and the tariffing of DSL services that are most important to ISPs. Finally, CIX discusses specific ISP concerns regarding the need for protections against potential anti-competitive behavior and additional ISP costs resulting from the proposed merger.

1. The Proposed Merger May Negatively Affect ISP Access to Wholesale DSL Services.

As the Parties explain in the *Application*,⁵ NorthPoint provides symmetric DSL (“SDSL”) primarily to business customers (including wholesale to ISPs), while Verizon provides asymmetric DSL (“ADSL”), which is primarily a consumer product.⁶ The Parties argue that the proposed merger is necessary to create an entity that is large enough to compete with cable systems for the provision of a variety of consumer broadband services.⁷

First, as noted above, NorthPoint currently provides SDSL to the business market, but is not generally active in the consumer ADSL market. The Parties’ arguments regarding the combined entity’s capability to compete with cable broadband, however, ignores the important differences between the consumer and business broadband markets. For instance, SDSL

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Landing License, Memorandum Opinion and Order, CC Docket No. 98-184 (re. Jun. 16, 2000) (“*Bell Atlantic/GTE Merger Order*”).

⁵ In the Matter of Joint Application of NorthPoint Communications, Inc. and Verizon Communications for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, To Transfer Control of Blanket Authorization To Provide Domestic Interstate Telecommunications Services as a Non-Dominant Carrier, Application for Transfer of Control, CC Docket No. 00-157, (Aug. 24, 2000) (“*Application*”).

⁶ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Second Report, CC Docket 98-146, FCC 00-290, at para. 99 (rel Aug. 3, 2000) (“*Second Report on Advanced Telecommunications Capability*”).

⁷ *Application*, Public Interest Statement, at 1.

transmission methodology competes with T-1 lines in the business market.⁸ T-1 lines are provided by a variety of carriers, including Verizon. T-1 lines, however, are not prevalent in the consumer broadband market, which is mainly served by ADSL and cable broadband. Furthermore, the Commission has already found that SDSL for businesses and ADSL for residential and small business customers represent two distinctly different markets.⁹ Consequently, it would be inconsistent for the Commission to disregard that previous finding in the course of the instant analysis. Moreover, utilization of an overly-broad relevant market definition in this proceeding may hide the serious risks that the proposed merger presents to independent ISPs that rely on access to wholesale consumer DSL services.

Second, from the ISP perspective, the critical issues at hand in the instant review are the consolidation of wholesale DSL service suppliers and the consequent increased likelihood of anti-competitive behavior by wholesale suppliers with affiliated ISPs. Supplier consolidation in the wholesale DSL service market could pose a serious threat to independent ISPs that do not self-provision DSL, but procure DSL service on a wholesale basis and resell it to their customers that seek high-speed Internet access. These ISPs rely on the thin margins that they can obtain between the cost of wholesale DSL service and the price at which they can sell a combination of ISP access and DSL service to their customers. Thus, access to wholesale DSL service is vital to the continued success of the independent ISPs that cannot utilize cable broadband access, but need to provide high-speed Internet access.

As a result of the proposed merger, the New NorthPoint will become the major provider of wholesale DSL service to Verizon, which competes with independent ISPs. Consequently, the

⁸ *Second Report on Advanced Telecommunications Capability*, at para. 99.

⁹ *Id.*, at paras. 99-101.

merger of those two entities creates an opportunity for discrimination and anti-competitive behavior that could be disastrous for independent ISPs. For instance, the New NorthPoint can specially design pricing and service programs that provide steep wholesale DSL discounts to affiliated ISPs (such as Verizon Online) while keeping wholesale DSL prices high for unaffiliated, smaller ISPs. As discussed below, this sort of an anti-competitive price squeeze already appears in Verizon's F.C.C. Tariff No. 1 with respect to ADSL volume discounts. Consequently, the Commission must take precautions in this proceeding to ensure that the opportunity for such behavior is minimized.

By failing to take such precautions, the Commission could inadvertently open the door to further consolidation in the wholesale DSL service market, allowing creation of a broadband oligopoly in which the few remaining providers of wholesale DSL service have an opportunity to collude with their affiliated ISPs to erect barriers to competitive entry, and unfairly compete with the independent ISPs that depend on competitive access to wholesale DSL services. Certainly, even the Parties' arguments regarding the prospect of competition between consumer DSL and cable broadband do not justify a loss of competition or anti-competitive behavior within the wholesale DSL market. The further entrenchment of market-specific, or even product-specific monopolies cannot be in the public interest, and was not the purpose of the 1996 Act.

Contrary to the Parties' argument that the proposed merger will not create a meaningful risk of lost competition because NorthPoint and Verizon are not "among a small number of most significant market participants,"¹⁰ NorthPoint and Verizon, collectively and individually, are extremely significant market participants. Specifically, the two entities currently provide service on a total of 600,000 DSL lines, more than three times as many as another DSL industry leader,

¹⁰ *Application*, Public Interest Statement, at 14-15.

Covad Communications.¹¹ Certainly, with such a large number of DSL lines in service, the Parties are among the most significant DSL market participants and, if joined, will have an undeniable impact on the wholesale DSL service supply.

Moreover, according to the Commission's *Second Report on Advanced Telecommunications Capability*, of the nearly 400,000 ADSL lines in service at the end of 1999, approximately 79% served the residential and small business market.¹² In addition, approximately 93% of those 400,000 lines were provided by incumbent local exchange carriers ("ILECs") while competitive local exchange carriers ("CLECs") served barely 7% of that market.¹³ NorthPoint, Covad Communications, and Rhythms Netconnections are three of the most prominent CLECs in the United States. By neutralizing NorthPoint as a competitive factor, the proposed merger would substantially cut into the ranks of CLECs that are fighting to make inroads into the wholesale DSL market, further diminishing the opportunity for ISPs to procure wholesale DSL services in a competitive market. Consequently, pursuant to the Commission's "transitional market framework,"¹⁴ the proposed merger poses a substantial likelihood of adversely affecting competition.

Finally, it is reasonable for the Commission to consider, in addition to, but not in place of the markets described above, another more inclusive market definition; consumer broadband. This market definition would include both consumer DSL and cable broadband services. With

¹¹ See *NorthPoint Press Release* at 2; CNET News.Com, *Covad to Add 30 Percent More Phone Lines*, Sep. 11, 2000, at 1, < http://yahoo.cnet.com/news/0-1004-200-2750394.html?pt.yfin.cat_fin.txt.ne>.

¹² *Second Report on Advanced Telecommunications Capability*, at paras. 100-101.

¹³ *Second Report on Advanced Telecommunications Capability*, at para. 102.

¹⁴ *Bell Atlantic/GTE Merger Order* at para. 98.

respect to this market, the Parties claim that the public interest will be served by the proposed merger because the largest cable companies *combined* will have the capability to provide broadband service to approximately 61 million homes by the end of this year. The Parties, however, neglect to mention that Verizon is already the largest provider of wireline and wireless services in the United States, with more than 100 million access lines and 25 million wireless customers.¹⁵

2. Bell Atlantic/GTE Merger Conditions

On June 16, 2000, the Commission approved, subject to certain pro-competitive conditions, the merger of Bell Atlantic Corporation and GTE Corporation, facilitating the creation of Verizon.¹⁶ The Commission determined that, absent these conditions, which are similar to those that the Commission adopted for the SBC/Ameritech merger, the merger of Bell Atlantic and GTE would not have been in the public interest because it would slow competition, enable discrimination against rival providers of advanced services, and increase the danger that collusive oligopolies would dominate the industry; creating a need for additional regulation.

Consequently, the Commission required Verizon to create one or more separate affiliates to provide advanced services in the Verizon region. The Commission also identified certain structural and non-structural safeguards to prevent Verizon and its advanced services affiliate from engaging in anti-competitive behavior. In particular, the FCC determined that Verizon's

¹⁵ Press Release, Verizon's Seidenberg Calls for Bold New Approach to Regulating Communications Technologies, PRNewswire, Sep. 25, 2000, available at: <http://biz.yahoo.com/prnews/000925/ny_verizon.html>.

Advanced Services Affiliate (“Verizon ASA”) would be distinct from Verizon’s regional telephone companies and operate largely in accordance with section 272 of the Telecommunications Act, which requires that: (1) each separate affiliate must operate independently from its affiliated Regional Bell Operating Company (“RBOC”); (2) the RBOC not discriminate among its affiliate and other CLECs; (3) the RBOC and its affiliate must comply with section 251; and (4) the RBOC and its affiliate not engage in joint marketing.¹⁷ Because it appears that NorthPoint will be assuming the role of a Verizon ASA, CIX strongly recommends that the Commission clearly state that these conditions, as they are described in the *Bell Atlantic/GTE Merger Order*, apply to the relationship between Verizon and NorthPoint.¹⁸

A. Residential Out-Of Region Entry

In the *Bell Atlantic/GTE Merger Order*, the Commission required that Verizon spend at least \$500 million to provide competitive local services outside of the Verizon service region by June 30, 2003. The Commission should now clarify that the initial transfer of equipment and

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¹⁶ See *Bell Atlantic/GTE Merger Order* at paras. 3-4.

¹⁷ Cite *Merger Order*, See also *Implementation of the Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996).

¹⁸ The Commission noted in the *Bell Atlantic/GTE Merger Order* that Verizon may only transfer to its affiliate facilities that the Commission has “explicitly declined to unbundle” and further observed that “to the extent that the incumbent LEC transfers a DSLAM in a remote terminal in which there is no collocation space, the separate affiliate will be a successor or assign with respect to that element.” *Bell Atlantic/GTE Merger Order*, at para. 271, n.609. See also 47 C.F.R. § 53.207.

cash that Verizon is making pursuant to the proposed merger with NorthPoint does not fulfil this obligation. Verizon is merely trading ownership of a set of assets for an equity position and control of another company's existing assets. This transaction will not directly result in further deployment of advanced services equipment or additional investment in facilities-based competition. Rather, the Commission should clarify that Verizon must still make the substantial investment described in the *Bell Atlantic/GTE Merger Order* to further the establishment of competitive out-of-region service.¹⁹ The Commission should also clarify, however, that Verizon may utilize NorthPoint to facilitate its further investment requirement. In this manner, the Commission can ensure that the fundamental purpose of this condition – causing Verizon to make a new investment to advance out-of-region, facilities-based competition – will ultimately be fulfilled.

B. Tariffing of Services Provided to ISPs

The Market-Opening Conditions, included in the *Bell Atlantic/GTE Merger Order*, state that Verizon shall transfer or assign all customers that are ISPs to the Verizon ASA.²⁰ Because Verizon is engaged in the ISP business, this condition is an important mechanism for ensuring that independent ISPs need not rely directly upon a powerful competitor for access to critical services. The Conditions also require that the Verizon ASA shall file, in advance of the transfer, any tariffs necessary for the Verizon ASA to provide such services.²¹ Because it appears that, pursuant to the proposed merger, the New NorthPoint will function as Verizon's ASA, the Commission should clarify that that the New NorthPoint must maintain an appropriate interstate

¹⁹ *Bell Atlantic/GTE Merger Order*, at paras. 319-320.

²⁰ *Id.*, at Appendix D, para. 6(b).

²¹ *Id.*

advanced services tariff with the Commission, and further direct the states to ensure that NorthPoint maintains appropriate tariffs in every state in which it operates. This condition is extremely important to ISPs, because the existence of such tariffs are a critical means for ensuring that the new NorthPoint, as Verizon's ASA, will not discriminate in favor of Verizon. Essentially, by placing the rates, terms, and conditions of advanced services in the open, these tariffs will provide even the smallest independent ISP the information and means to ensure that it will receive nondiscriminatory access to the new NorthPoint's services.

The Parties indicate that the New NorthPoint will provide wholesale services and retail services through other Verizon companies that can market the new NorthPoint's services. The Commission must look carefully at this situation, and clearly state that it will not allow Verizon to utilize this arrangement to procure advantageous wholesale supply terms for its retail companies while effectively precluding smaller entities from obtaining similarly advantageous terms. Specifically, the Commission should reject any attempt by the New NorthPoint to tariff wholesale DSL so that low-volume clients, such as smaller independent ISPs, must pay unreasonably high rates while the largest potential clients, such as Verizon and America Online, benefit from steep discounts. Certainly, volume discounts are an important and valuable competitive pricing concept. However, in the wholesale DSL service industry, which is dominated by a few powerful ILECs that still benefit from their monopolistic legacy, volume discounts can be an effective means for facilitating anti-competitive pricing discrimination.

This situation currently exists with respect to Verizon's Tariff F.C.C. No. 1, which states that Verizon will provide a 21% discount on Infospeed DSL Service rates to wholesale customers that are willing to commit to procuring one million DSL lines within five years.²²

²² The lowest volume and term discount level provides a rate of \$37.95 per month for 640k rate Infospeed DSL service, and requires a five year commitment of 1000 DSL lines. The best rate for the same service is \$29.95 per

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Consequently, a wholesale customer seeking to take advantage of such rates, such as an independent ISP, would have to commit to purchase 7.9% of the 5.7 million DSL lines that are expected to be in service in the entire United States by the year 2003.²³ As a point of reference, Verizon and NorthPoint combined have only 600,000 DSL lines in service.²⁴ It defies reason to expect that an individual independent ISP, especially one serving a secondary or rural market, will be able to commit to provide service to 7.9% of the total national DSL market in two years time.²⁵ Obviously, such a commitment is clearly out of reach of any except the very largest ISP, or an ISP that was so closely affiliated to the wholesale supplier that it was not concerned about having to pay a substantial shortfall penalty.

Verizon's current volume discounts are only marginally more realistic at lower volume commitments. For instance, Verizon's 8% volume discount for wholesale customers that can commit to 100,000 DSL lines over five years, is not likely to help many independent ISPs. A substantial number of ISPs, especially those in rural areas, serve regions that do not even have 100,000 potential customers. Consequently, under Verizon's current tariff, these independent ISPs simply cannot provide DSL to their customers in competition with Verizon. This discriminatory and anti-competitive behavior cannot be permitted to extend to the New

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month, 21% less than \$37.95, which is available to wholesale customers that can commit to 1 million lines over five years. See Verizon Tariff F.C.C. No. 11, 2nd Revised Page 31-242.1.

²³ See *NorthPoint Press Release* at 1-2; Verizon Tariff F.C.C. No. 11, 2nd Revised Page 31-242.1.

²⁴ See *NorthPoint Press Release* at 2.

²⁵ Assuming that 2003 would correspond to year three of the five year commitment specified in Verizon's Tariff, an independent ISP seeking to obtain the maximum volume discount would have to commit to 450,000 DSL lines in Verizon territory, representing 7.9% of the 5.7 million lines that NorthPoint expects to be in service in the nation at that point.

NorthPoint, and Verizon cannot be permitted to leverage its huge scale to obtain rates and terms that substantially discriminate in its favor. Thus, the Commission should require that the New NorthPoint file state and federal wholesale DSL tariffs and emphasize that those tariffs may not amount to collusive shams that foreclose real competitive access to wholesale DSL services. In addition, the Commission should specify that if the New NorthPoint seeks to include volume discounts or other volume-related benefits in these tariffs, the commitments must be realistic and non-discriminatory.

The Commission should also consider the prospect of stimulating competitive and public interest-oriented opportunities involving the ISP industry. For instance, the Commission should direct the New NorthPoint to include in its state and federal tariffs new incentives such as: special discounts for wholesale DSL services in rural and under-served areas to assist the small and independent ISPs that specialize in these markets; and “most favored nation” provisions that enable ISPs to maintain competitive parity if the New NorthPoint further discounts the services it provides to its affiliates, such as Verizon Online.

3. Other ISP Concerns

A. Protection from Anti-Competitive Acts

The Parties state that NorthPoint and Verizon individually provide DSL access to “literally hundreds” of ISPs that use their open access platforms. They further argue that the New NorthPoint will be able to combine those operations into a single open platform that will be more broadly available than either company alone presently provides. The Parties then conclude that this combined platform will provide ISPs with a more efficient means of access to the national consumer market. While CIX recognizes that independent ISPs could potentially benefit from such a combination, it is concerned about the potential for discriminatory behavior that could prevent ISPs from ever realizing those benefits. Consequently, CIX recommends that the Commission emphasize that non-discriminatory provisioning of services to ISPs, CLECs, and consumers, is critical to this and every other aspect of the proposed merger. In particular,

non-discriminatory ISP access to the DSL platform must be established and preserved, and Verizon cannot be permitted to obtain discriminatory or preferential access to the new NorthPoint's services. In this instance and in general, the Commission should strongly emphasize that it will not tolerate Verizon's misuse of its advanced services affiliate, no matter how separate it purports that affiliate to be.

B. ISP Costs Should Not Rise Because of Verizon's Need to Comply with Section 271 of the Telecommunications Act.

Finally, the Parties commit to full compliance with section 271 of the Telecommunications Act that bars RBOCs from participation in the interLATA business until certain criteria are met.²⁶ The Parties specifically note that in some circumstances NorthPoint provides its Regional Connect service to ISPs that interconnect with NorthPoint in a state in which Verizon is not authorized to provide interLATA services pursuant to section 271.²⁷ To resolve that situation, the Parties indicate that NorthPoint will modify its Regional Connect service to permit another interLATA provider to provide the interLATA transport from the ISP's interconnection point to NorthPoint nodes in other LATAs. CIX does not disagree with this proposal, but remains concerned that ISPs could be faced with higher rates as a result. Consequently, CIX recommends that the Commission clarify that this proposal may not result in additional costs to be born by ISPs, and that the Parties must absorb any switching charges or other costs relating to this proposal.²⁸ Although those costs are insignificant from the RBOC

²⁶ See 47 C.F.R. § 271.

²⁷ See *Application*, Public Interest Statement, at 26.

²⁸ The substance of this proposal is consistent with the Commission's "anti-slamming" rules that protect long distance service customers from switching and other surcharges caused by the need to change long distance carriers that can result from events such as mergers and acquisitions in that market sector. See *In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*;

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perspective, they can be quite significant from the perspective of a small ISP that is directly affected by this change. CIX believes that as a rule, it is not acceptable to require ISPs to absorb additional costs in order to indemnify RBOC's from expenses that result from their need to comply with market-opening regulations, especially when those costs are insignificant from the RBOC's perspective.

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Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers, Second Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 1508 (1998), appeal in abeyance sub nom. MCI WorldCom, Inc. v. FCC, No. 99-1125 (D.C. Cir.).


CONCLUSION

CIX urges the Commission to continue to maintain its vigilance and support for competition in the telecommunications markets. Such competition is fostered by promoting freedom of ISP and carrier choice for consumers, and will be further encouraged by adopting CIX's recommendations. By doing so, the Commission will help to ensure that local facilities are fully opened for competition.

Respectfully submitted,

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October 2, 2000

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I, Mary W. Malone, certify that I have, on this 2nd day of October, 2000, caused a true and correct copy of the foregoing "Comments of The Commercial Internet Exchange Association" to be hand delivered to:

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